Supreme Court, U.S.

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**In the**
**Supreme Court of the United States**
**October Term, 1998**

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STEELTEK, INC., *Petitioner*,
v.
RANDY D. GRIFFIN, *Respondent*.

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a plaintiff who is not "a qualified individual with a disability" can assert a cause of action based on pre-offer medical inquiries in violation of 42 U.S.C. § 12112(d)(2)(A) of the Americans with Disabilities Act.

## LIST OF PARTIES

The Petitioner is Steeltek, Inc., an Oklahoma corporation which has not issued any shares to the public and has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

The Respondent is Randy D. Griffin, an individual.

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## REFERENCES TO OFFICIAL OPINIONS

The opinion of the Court of Appeals is reported as *Griffin v. Steeltek, Inc.*, 160 F.3d 591 (10th Cir. 1998), and is reproduced in the Appendix beginning at page 1. The opinion of the district court is reported as *Griffin v. Steeltek, Inc.*, 964 F. Supp. 317 (N.D. Okla. 1997), and is also included in the Appendix beginning at page 15.

## STATEMENT OF BASIS FOR JURISDICTION

On October 29, 1998, the United States Court of Appeals for the Tenth Circuit entered its order reversing summary judgment in favor of Steeltek and remanding to the Northern District of Oklahoma for further proceedings. Review of that order is sought under 28 U.S.C. § 1254(1), pursuant to Supreme Court Rule 10(a) and 10(c). The district court's jurisdiction was premised upon 28 U.S.C. § 1331 and jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291. Appeal was taken from the district court's May 19, 1997, order granting summary judgment in favor of Steeltek.

## STATUTORY PROVISION INVOLVED

This litigation involves the interpretation of 42 U.S.C. § 12112, set forth in relevant part below, as well as in the appendix page 21.

## STATEMENT OF THE CASE

In 1996, Defendant-Appellant Steeltek, Inc. ("Steeltek") sought applicants for a "grinder." Plaintiff-Appellee Randy Griffin ("Griffin"), among others, completed an application. The application form Griffin completed asked various questions, including:

> Have you received Worker's Compensation or Disability Income Payments? If yes, please describe.
>
> Have you physical defects which preclude you from performing certain jobs? If yes, please describe.

In response to the first question, Griffin wrote "3 degree burn to hand & foot, surgery to elbow, spain [sic] in shoulder." Griffin did not answer the second question.

Steeltek declined to hire any of the applicants because none, including Griffin, had two years of experience as a grinder. Griffin sued Steeltek claiming the application violated the pre-offer medical inquiry prohibition of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112(d)(2)(A). The ADA pertinently provides:

> **(a) General Rule**
>
> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
>
> * * * *
>
> **(d) Medical examinations and inquiries**
>
> **(1) In general**
>
> The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.
>
> **(2) Preemployment**

> **(A) Prohibited examination or inquiry**
> Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

42 U.S.C. § 12112(a), (d). Griffin sought only money damages, he did not seek injunctive relief of any kind.

Steeltek moved for summary judgment because Griffin could not establish a *prima facie* case of discrimination under the ADA because he was neither disable nor perceived as being disabled.[1] The district court agreed, concluding:

> Because Plaintiff has failed to allege either that he was disabled or perceived as disabled as defined under the ADA, he has not established a prima facie case of disability discrimination. For this reason, the Defendant is entitled to judgment as a matter of law.

*Griffin v. Steeltek*, 964 F. Supp. 317, 319 (N.D. Okla. 1997), Appendix at page 19.

Griffin appealed to the Tenth Circuit arguing that a job applicant need not make a showing of disability or perceived disability to state a *prima facie* case under the ADA. The Tenth Circuit agreed, in a split opinion, reversing summary judgment and remanding for further proceedings. Appendix at pages 1-14. Steeltek seeks review by this Court on the important

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[1]Griffin conceded that he was not disabled or perceived as having a disability by Steeltek.

question of whether a plaintiff must be "a qualified individual with a disability" to state a cause of action for money damages under the ADA.

## ARGUMENT

*Certiorari* is appropriate here because the Tenth Circuit opinion below creates an intolerable conflict with the opinion of the Fifth Circuit in *Armstrong v. Turner Industries, Inc.*, 141 F.3d 554 (5th Cir. 1998), and the opinion of the Seventh Circuit in *Hunter v. Habegger Corp.*, 139 F.3d 901, 1998 WL 104635 (7th Cir. March 5, 1998). This conflict can only be resolved by this Court.

*Certiorari* is also appropriate here because this litigation raises questions of importance in the administration and construction of the ADA and also raises far reaching public policy considerations. *Certiorari* is generally favored when litigation raises questions of importance in the administration of a federal statute. *United States v. Ruzicka*, 329 U.S. 287, 288 (1946). Similarly, *certiorari* is appropriate when litigation raises important issues concerning the construction of a federal statute. *United States v. Donovan*, 429 U.S. 413, 416 (1977). As in *Ruzicka*, the general scheme of the ADA and its operation have frequently been before this Court in the very recent past. *See, e.g., Wright v. Universal Maritime Serv. Corp.*, ___ U.S. ___, 119 S.Ct. 391 (Nov. 16, 1998) (No. 97-889); *Cleveland v. Policy Mgmt. Sys. Corp.*, ___ U.S. ___, 119 S.Ct. 39 (Oct. 5, 1998) (No. 97-1008); *Bragdon v. Abbott*, ___ U.S. ___, 118 S.Ct. 2196 (June 25, 1998) (No. 97-156); and *Pennsylvania Dept. of Corrections v. Yeskey*, ___ U.S. ___, 118 S.Ct. 1952 (June 15, 1998) (No. 97-634).

Because there is a conflict among the Circuit Courts of Appeals, as well as the significant underlying public policy

implications, Steeltek requests this Court to grant certiorari to resolve this important issue.

## I. THE TENTH CIRCUIT OPINION CONFLICTS WITH DECISIONS BY THE FIFTH AND SEVENTH CIRCUIT.

The Circuit Courts conflict on whether the term "job applicant" in § 12112(d)(2)(A) is limited by the language in § 12112(a), protecting "qualified individual[s] with a disability". It is not likely this conflict may be resolved through future cases in the Courts of Appeals because they conflict on this issue. This conflict is intolerable and should be resolved by this Court.

The Fifth Circuit recently ruled that an individual who is not disabled or otherwise qualified cannot maintain a cause of action under the ADA based on pre-offer medical inquiries. *Armstrong v. Turner Industries, Inc.*, 141 F.3d 554 (5th Cir. 1998). There, the plaintiff responded to medical inquiries very similar to those presented to Griffin. Plaintiff sued defendant alleging, *inter alia*, although he was not disabled under the ADA, the medical inquiries constituted an independently-actionable "facial violation" of § 12112(d). The district court granted summary judgment in favor of the employer, ruling that "the most reasonable interpretation of [§ 12112(d)(2)] is that if a separate claim can be brought for violation of this section, it must be brought by a qualified individual with a disability as that term is defined by the ADA." *Armstrong v. Turner Industries, Ltd.*, 950 F. Supp. 162, 167 (M.D. La. 1996). Although it assumed for purposes of the appeal that plaintiff had a cause of action, the Fifth Circuit, in affirming the dismissal of plaintiff's claims, ruled:

> The magistrate judge found "nothing in the legislative history which supports the

> conclusion that Congress intended any job applicant to have a cause of action for violation of the ADA rules on preemployment examinations and inquiries." *Armstrong*, 950 F. Supp. at 167. Likewise, we are unable to find any support for the proposition that a violation of the section 12112(d), standing alone, was intended to give rise to damages liability.

*Armstrong*, 141 F.3d at 561 n.17. The Tenth Circuit opinion below directly conflicts with this Fifth Circuit opinion.

The Seventh Circuit similarly ruled that a plaintiff had to be a "qualified individual with a disability" in order to assert an ADA cause of action based on pre-offer medical inquiries. *Hunter v. Habegger Corp.*, 139 F.3d 901, 1998 WL 104635 (7th Cir. March 5, 1998). While the applicant in *Hunter* was disabled, the Court, quoting *Armstrong*, stated that subsection (d)(1)'s specific referral back to subsection (a) required the plaintiff to be disabled and otherwise qualified, as set forth in § 12112(a) of the ADA. Deciding that § 12112(a) limited the scope of § 12112(d)(2)(A)'s use of "job applicant", the Court ruled:

> The parties have cited no cases which directly address the issue of whether an individual who is otherwise not qualified may maintain a claim for violation of the ADA's standard regarding medical inquiries during the job application process. Both the statute and the EEOC regulations suggest that an individual must be otherwise qualified in order to prevail on such a claim.
>
> . . .
>
> Since statutory subsections *pari materia* must be

> construed with reference to each other, it seems clear that in order to assert that one has been discriminated against because of an improper medical inquiry, that person must have also been otherwise qualified.

*Hunter*, 1998 WL 104635 at *14. The Tenth Circuit opinion below directly conflicts with this Seventh Circuit opinion.

Notwithstanding *Armstrong* and *Hunter*, the Tenth Circuit determined that a job applicant need not make a showing of disability or perceived disability to state a claim under § 12112(d)(2)(A). *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 595 (10th Cir. 1998), appendix at page 10. In other words, in the Tenth Circuit, a plaintiff need not be "a qualified individual with a disability" to state a cause of action for money damages under the ADA.

Distinguishing *Armstrong*, the Tenth Circuit supported its decision with the proposition that the policy of the ADA is best served by allowing all job applicants to bring a cause of action for alleged violations of § 12112(d)(2)(A). In reaching this decision, however, the Tenth Circuit is in conflict with *Armstrong* on whether non-disabled applicants have a cause of action for § 12112(d)(2)(A) violations, as well as with both *Armstrong* and *Hunter* regarding the scope of the term "job applicant" and whom Congress intended that phrase to encompass.

The Tenth Circuit has created an intolerable conflict between the Circuit Courts concerning the intended scope of § 12112(d)(2)(A) and the term "job applicant." Therefore, this Court should grant *certiorari* to resolve this conflict and unify the law. *See McElroy v. United States*, 430 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the

Circuits on the issue of statutory construction"); *Marks v. United States*, 430 U.S. 188, 189 (1977) (certiorari granted "to resolve a conflict in the Circuits"); *Shapiro v. United States*, 335 U.S. 1, 4 (1948) (certiorari granted "because this conflict involves an important question of statutory construction").

## II. THE TENTH CIRCUIT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This litigation raises important issues concerning the scope of protection Congress intended when enacting the ADA. The important issue is whether the ADA provides *all* job applicants a cause of action for money damages when an employer asks pre-offer medical questions, or whether such protections extend only to "qualified individual[s] with a disability". An individual who is not a "qualified individual with a disability" is not entitled to sue for damages under the ADA for precisely the same reason that a white person is not entitled to sue claiming he has been discriminated against because he is black in violation of Title VII of the Civil Rights Act, or a 30-year old individual is not entitled to sue for age-based discrimination under the Age Discrimination in Employment Act. Congress did not enact the ADA to protect non-disabled job applicants.

Since the phrase "job applicant" in § 12112(d)(2)(A) is not expressly defined, a growing number of courts[2] have

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[2]See *Griffin v. Steeltek, Inc.*, 160 F.3d 591 (10th Cir. 1998); *Armstrong v. Turner Industries, Inc.*, 141 F.3d 554 (5th Cir. 1998); *Hunter v. Habegger Corp.*, 139 F.3d 901, 1998 WL 104635 (7th Cir.(Ind.)); *Adler v. I & M Rail Link*, 13 F. Supp.2d 912, 937 (N.D. Iowa 1998); *Varnagis v. City of Chicago*, 1997 WL 361150 *6 (N.D. Ill. 1997).

recently been asked to address the specific issue of whether "job applicant" allows *all applicants* the protections afforded under the ADA, or whether such protections extend only to "qualified individual[s] with a disability". Courts will continue to be forced to confront this issue until such time as this Court settles this important question of federal law.

## III. THE TENTH CIRCUIT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

It is a fundamental principle of statutory construction that the meaning of the statutory language cannot be determined in isolation, but must be drawn from the context in which it is used. *Textron Lycoming Reciprocating Engine Div. v. UAW*, ___ U.S. ___, 118 S.Ct. 1626, 1629 (1998); *Deal v. United States*, 508 U.S. 129, 132 (1993). Furthermore, a court must not construe statutory phases in isolation, but rather must read the statute as a whole. *United States v. Morton*, 467 U.S. 822 (1984); *see also Hall v. Russell*, 101 U.S. 503, 512 (1879) (other sections of a statute may be resorted to if necessary to ascertain the meaning of a particular section).

Consequently, the term "job applicant", as used in § 12112(d)(2)(A) of the ADA, cannot be interpreted in isolation. Rather its meaning must be drawn from the context in which it was used, reading § 12112 as a whole. Section 12112(d)(1) specifically refers back to § 12112(a), indicating that a "job applicant" must be "a qualified individual with a disability" to receive the protections afforded by the ADA. Considering the fact that § 12112(d)(1) explicitly refers to § 12112(a) and the "qualified individual with a disability" language, only those individuals who can show that they are a "qualified individual with a disability" should be able to maintain a cause of action

for money damages[3] for a violation of the pre-offer medical inquiry prohibition of § 12112(d)(2)(A).

The Tenth Circuit, in reversing summary judgment in favor of Steeltek, disregarded fundamental principles of statutory construction. This Court should grant *certiorari* to correct the illogical conclusion fostered by the opinion below that one who is not a "qualified individual with a disability" can maintain a cause of action for money damages under the ADA.

## CONCLUSION

WHEREFORE, Steeltek requests this Court to issue a writ of *certiorari* to the Tenth Circuit.

Respectfully submitted
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[3]Griffin did not seek injunctive relief in his original complaint, but instead sought only money damages.

# APPENDIX

[Filed Oct. 29, 1998]

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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No. 97-5103

Randy Griffin, Plaintiff-Appellant,
v.
Steeltek, Inc., Defendant-Appellee.

Equal Employment Opportunity Commission, Amicus Curiae.

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 97-CV-136-K)

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William S. Leach, Rhodes, Hieronymus, Jones, Tucker & Gable, Tulsa, OK, for Defendant-Appellee.

C. Gregory Stewart, General Counsel, J. Ray Terry, Jr., Deputy General Counsel, Gwendolyn Young Reams, Associate General Counsel, Carolyn L. Wheeler, Assistant General Counsel, Paula R. Bruner, Attorney, Equal Opportunity Employment Commission, Washington, DC, on brief for Amicus Curiae.

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Before BALDOCK, Circuit Judge, McWILLIAMS, Senior Circuit Judge, and EBEL, Circuit Judge.

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EBEL, Circuit Judge.

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This case requires us to determine whether a non-disabled individual has a cause of action under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(d)(2)(A), when as a job applicant he or she is asked questions regarding his or her medical history or condition on an employment application. We conclude that in light of the language of the statute and the purposes of its enactment, a non-disabled job applicant does have such a cause of action. Consequently, we reverse the district court's grant of summary judgment in favor of the employer in this case.

BACKGROUND

Plaintiff-Appellant Randy Griffin ("Griffin"), a non-disabled individual, applied for a position as a grinder with Defendant-Appellee Steeltek, Inc. ("Steeltek"). Griffin was not hired for the position, allegedly because he did not have the two years of grinding experience required by Steeltek. According to Griffin, he was never told that Steeltek required two years of grinding experience, and in fact was told at the time he applied that he was the best qualified applicant for the position.

After Steeltek declined to hire Griffin, Griffin filed suit in the Northern District of Oklahoma, contending that Steeltek's application process violated the ADA, 42 U.S.C. § 12112(d)(2)(A). That section prohibits employers from asking a job applicant "whether such applicant is an individual with a disability or as to the nature or severity of such disability." Griffin identified two questions on Steeltek's employment application that allegedly violated § 12112(d)(2)(A). The first question asked: "Have you received Worker's Compensation or Disability Income payments? If yes, describe." The second asked: "Have you physical defects which preclude you from

performing certain jobs? If yes, describe." In response to the first question, Griffin wrote "3 degree burn to hand & foot, surgery to elbow, spain [sic] in shoulder." He left the answer space blank in response to the second question. Griffin did not contend that he was disabled or that Steeltek perceived him to be disabled. Rather, the sole basis of Griffin's claim was that Steeltek violated the ADA by asking these two questions and then by not hiring him because of his responses to these improper questions. Griffin also advanced evidence in an affidavit that the reason Steeltek said it did not hire him--because he did not have two years of grinding experience--was pretextual. His affidavit stated that he was never told by Steeltek that a set amount of time of prior experience was required for the job, and, in fact, he was told he was the "most qualified applicant" and "would probably be hired" based upon his experience.

The district court held that "[b]ecause [Griffin] has failed to allege either that he was disabled or perceived as disabled as defined under the ADA, he has not established a prima facie case of disability discrimination." Hence, Steeltek was entitled to summary judgment "as a matter of law."

Because the district court ruled as a matter of law that Griffin had failed to establish a prima facie case because he was neither disabled nor perceived to be disabled, the court never reached the issue of whether Griffin was causally injured by being required to answer the impermissible questions. Additionally, the court did not rule whether Steeltek's proffered reason for not hiring Griffin--that he lacked two years of grinding experience--was pretextual. The district court did observe, however, that "the parties dispute whether this requirement [of two years grinding experience] was ever revealed to [Griffin], or whether the requirement actually existed." By acknowledging that the issue of injury and the bona fides of Steeltek's proffered reasons were in dispute, the district court implicitly acknowledged that summary judgment

would not be appropriate at this time on those grounds. Thus, as the case comes before us and as it was ruled upon below, it presents a pure legal question: does a job applicant fail *as a matter of law* to state a prima facie claim under 42 U.S.C. § 12112(d)(2) of the Americans with Disabilities Act if the applicant is neither disabled nor perceived to be disabled. We believe that question has already been answered in the negative in our Circuit in *Roe v. Cheyenne Mountain Conf. Resort, Inc.*, 124 F.3d 1221 (10th Cir.1997), and that *Roe* requires us to reverse and remand for further proceedings in this case.

## DISCUSSION

We review a grant of summary judgment *de novo*, applying the same standard under Federal Rule of Civil Procedure 56(c) as the district court. *See Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1081 (10th Cir.1997). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See id.*

The ADA section at issue in this case, 42 U.S.C. § 12112(d)(2), states:

> (d) Medical examinations and inquiries
>
> ...
>
> (2) Preemployment
>
> (A) Prohibited examination or inquiry
>
> Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.
>
> (B) Acceptable inquiry
>
> A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

Griffin and the EEOC argue that this section provides all

applicants, disabled or not, with a cause of action against employers who include impermissible questions on their employment applications. For the purpose of the motion for summary judgment, we shall assume without deciding that the two questions here at issue would have been impermissible and actionable if directed toward a disabled job applicant.[4] The issue we must decide is whether improper medical questions are actionable under § 12112(d)(2) if asked of a non-disabled applicant.

Although we have never had occasion to analyze § 12112(d)(2), this court was recently called upon to construe s 12112(d)(4), the § 12112(d) subsection prohibiting medical examinations and inquiries of current employees.[5] *See Roe v. Cheyenne Mountain Conf. Resort, Inc.*, 124 F.3d 1221 (10th Cir.1997). In *Roe*, defendant employers instituted a broad drug and alcohol testing policy that, inter alia, required employees to report to their supervisors any type of prescription medication they used. *See id.* at 1226. The plaintiff there, who was an employee of the defendant, claimed that this requirement violated § 12112(d)(4) and was granted summary judgment. *See*

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[4]In the appendix to the federal regulations implementing Title I of the ADA, it states, "This provision makes clear that an employer cannot inquire as to whether an individual has a disability at the pre-offer stage of the selection process. Nor can an employer inquire at the pre-offer stage about an applicant's workers' compensation history." 29 C.F.R. Pt. 1630, App. at 362-63 (1998).

[5]42 U.S.C. § 12112(d)(4)(A) states:

> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

*id.* at 1226-27.

On appeal, the employer contended that plaintiff lacked standing to bring this claim because she had not shown that she was a disabled individual. *See id.* at 1228. We rejected this argument, noting that "whether a plaintiff suing under the ADA comes within the definition of a person with a disability is simply not a question of standing but of whether an essential element of the claim can be established." *Id.* at 1229. Plaintiff had standing because she "sufficiently alleged" each of the elements of standing: that she had suffered an injury in fact, that the defendant's conduct caused her injury, and that it was likely a favorable decision would redress the injury. *See id.* Addressing whether plaintiff had established an essential element of her claim, we held "plaintiff's ability to maintain the particular ADA claim she has alleged does not require her to prove that she is an individual with a disability." *Id.* We continued:

> As the district judge aptly observed, adopting defendant's position would defeat the very purpose of prohibiting disability related inquiries: "It makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability." We also agree with the district court's reasoning that this common sense rejection of defendant's argument is consistent with the statutory language:
>
> The ADA explicitly prohibits employers from making disability-related inquiries of employees, unless the inquiry is job-related or consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A). This provision applies to all employees. Unlike suits based on a failure to provide a reasonable accommodation, this provision is not limited to qualified individuals

with disabilities. *Cf.* 42 U.S.C. § 12112-(b)(5)(A).

*Id.* (citation omitted).[6]

Although the *Roe* panel specifically stated that it was not deciding the issue before us today pertaining to job applicants and § 12112(d)(2), *see id.* at 1229 n. 5, we find that the reasoning articulated in *Roe* applies equally to § 12112(d)(2). The language of the two statutes is very similar. Section 12112(d)(2) uses the term "job applicant," while § 12112(d)(4) uses the term "employee." It is important that neither section uses the narrower defined term of "qualified individual with a disability," which is the term Congress used in much of § 12112 but chose not to use in § 12112(d)(2) or § 12112(d)(4). *Compare* 42 U.S.C. §§ 12112(a), 12112(b). The use of terms in §§ 12112(d)(2) & (4) defining a broader class of people than the class specified elsewhere in the ADA (the class of qualified individuals with disabilities) cannot be accidental, and it points inextricably to the broader scope of coverage intended for those two sections.

In addition, the policy of the ADA is to eliminate disability discrimination. *See* H. Rep. No. 101-485(II), at 22-23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304 ("The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities...."). This policy is best served by allowing all job applicants who are subjected to illegal medical questioning and who are in fact injured thereby to bring a cause of action against offending employers, rather than to limit that right to a narrower subset of applicants who are in fact disabled. The legislative history of the ADA indicates that Congress wished to curtail all

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[6] *See Gonzales v. Sandoval County*, 2 F.Supp.2d 1442, 1444 (D. N.M.1998) ("Plaintiff, however, need not establish disability to state a claim for a prohibited inquiry under the ADA." (citing *Roe*)).

questioning that would serve to identify and exclude persons with disabilities from consideration for employment by drafting "a prohibition on pre-offer medical examinations or inquiries," *see id.* at 72-73, *reprinted in* 1990 U.S.C.C.A.N. at 355, and allowing non-disabled job applicants who are injured thereby to sue will enhance and enforce the blanket prohibition drafted by Congress. Furthermore, Congress was also concerned with the potential stigmatizing effect of medical inquiries and examinations, noting that individuals with diseases such as cancer "may object merely to being identified, independent of the consequences." *See id.* at 75, *reprinted in* 1990 U.S.C.C.A.N. at 357-58. If we were to require individuals to make a showing of disability as part of a prima facie § 12112(d)(2) case, we would in effect be making individuals with disabilities identify themselves as disabled to prevent potential employers from inquiring whether they have a disability. Such a course makes little sense.[7]

We note that the Fifth Circuit recently held that a non-disabled plaintiff could not proceed with a suit for being asked impermissible medical questions on an employment application. *See Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 562 (5th Cir.1998). In that case, however, the court assumed without deciding that a non-disabled plaintiff did have a cause of action under § 12112(d)(2) and went on to determine

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[7]In addition, we give little weight to the fact that the ADA is entitled the "Americans *With* Disabilities" Act (emphasis added). "[U]nder the general rules of statutory interpretation, the title to a statutory provision is not part of the law itself, although it can be used to interpret an ambiguous statute." *Johnston v. Commissioner of Internal Revenue*, 114 F.3d 145, 150 (10th Cir.1997) (quotations omitted). Further, the legislative history of the ADA indicates that the title was not meant to be an exclusive listing of the persons to be covered by the ADA. *See* H. Rep. No. 101-336(II), at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 333 (noting that the ADA's protection is not limited to "Americans" despite the title).

whether a violation of that section alone constituted a compensable injury. *See id.* at 559, 561. The Fifth Circuit concluded that the applicant needed to show "some cognizable injury in fact of which the violation is a legal and proximate cause for damages to arise from a single violation." *Id.* at 562. Because the non-disabled applicant in that case could not show a cognizable injury caused by being asked the impermissible questions, the court concluded that he had failed to show entitlement to damages and affirmed the dismissal of his suit. *See id.* at 562, 564. However, the court held open the "possibility of liability based on any injuries legally and proximately caused by such a violation." *Id.* at 562 n. 20. In contrast to *Armstrong*, in our case Griffin has sufficiently alleged that he suffered an injury in fact, specifically that Steeltek did not hire Griffin because of his responses to the impermissible questions, and he seeks damages and injunctive relief to remedy his injury. Consequently, we hold that his suit

can go forward.[8]

CONCLUSION

A job applicant need not make a showing that he or she is disabled or perceived as having a disability to state a prima facie case under 42 U.S.C. § 12112(d)(2). Consequently, we REVERSE the district court's grant of summary judgment and REMAND for the district court to determine whether the questions on Steeltek's questionnaire violated the ADA's prohibition on medical inquiries, and, if so, whether Griffin is entitled to the relief he seeks.

No. 97-5103, *Griffin v. Steeltek, Inc.*

BALDOCK, Circuit Judge, dissenting.

In its haste to make law, the court loses sight of the

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[8]The dissent suggests that Griffin may not be able to prove injury because the affidavit of Johnny McKnight, Steeltek's plant manager, asserts that the decision not to hire Griffin had nothing to do with any disability he may have had or any perception that he was disabled. That, however, is not the basis of Griffin's claim. He does not claim he was injured because of his disability or perception of disability, but rather because of incriminating responses and refusals to respond to questions which the ADA prohibits from being asked. Hence, that portion of Mr. McKnight's affidavit is simply unresponsive to Griffin's claim. Mr. McKnight's affidavit goes on to state that Steeltek did not hire Griffin because of his inadequate experience as a grinder. However, Griffin's affidavit in opposition to the summary judgment motion challenges that proffered reason as pretextual, and the district court acknowledged that was a disputed issue. Thus, summary judgment cannot be supported at this time on that basis. It may be that, at trial, Steeltek will be able convincingly to show that its proffered reason was bona fide. In that case, it will prevail. All we are holding in this case is that it was error to rule, as the district court did, that a job applicant cannot as a matter of law state a prima facie claim under § 12112(d)(2)(A) of the ADA unless he or she is disabled or perceived to be disabled. At trial, of course, before the plaintiff can prevail he must prove injury flowing from his or her responses to employment questions which the ADA prohibits from being asked.

procedural posture of this case and holds that the ADA provides a non-disabled job applicant with a cause of action against a prospective employer for violating 42 U.S.C. § 12112(d)(2)(A). Specifically, the court confuses the standard for dismissing a claim under Fed.R.Civ.P. 12(b)(6), with the standard for granting summary judgment under Fed.R.Civ.P. 56. In this case, the wise policy of judicial restraint counsels that we assume the ADA provides Plaintiff with a cause of action despite his lack of disability or perceived disability, and that Plaintiff has established a violation of § 12112(d)(2)(A). Thus, Plaintiff's complaint may withstand a Rule 12(b)(6) motion to dismiss. These assumptions alone, however, are insufficient to withstand Defendant's Rule 56 motion for summary judgment. Whether in some other context the law might afford a non-disabled individual judicial relief for a violation of § 12112(d)(2)(A), Plaintiff in this case has not demonstrated any redressible injury as a result of Defendant's improper questioning. *See* Court's Op. at 11 n. 5 (acknowledging that "before the Plaintiff can prevail he must prove injury flowing from his ... responses to employment questions which the ADA prohibits"). Accordingly, I would affirm the district court's grant of summary judgment to Defendant.[1]

In his affidavit in support of Defendant's motion for summary judgment, Johnny McKnight, Steeltek's plant

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[1]Despite this court's contrary assertion, the district court did not acknowledge that the issue of injury was in dispute and that summary judgment would be inappropriate on those grounds. The court never reached that question. Instead, the court held that Plaintiff had not established a prima facie case of disability discrimination because he failed to allege that he was disabled or perceived to be disabled. *Griffin v. Steeltek, Inc.*, 964 F. Supp. 317, 319 (N.D. Okla.1997). While I would not affirm the district court on the basis of its holding, the law is well established that "we may affirm on any ground supported by the record." *Gowan v. United States Dept. of the Air Force*, 148 F.3d 1182, 1189 (10th Cir.1998).

manager, stated:

> The fact that we were not able to offer Mr. Griffin a position with our company had absolutely nothing to do with any disability he may have had or our perception of any disability he may have had. The fact that we were unable to offer him a position of employment was due solely and exclusively to the fact that he had insufficient experience to do the job safely.

Appellant's Appendix at 15. Plaintiff responded by stating that he had "not sued Defendant claiming that Defendant considered Plaintiff disabled or that Plaintiff was disabled. Rather, Plaintiff has sued Defendant for a rank and admitted violation of the [ADA]." *Id.* at 18. Plaintiff continued: "The bottom line is that Defendant improperly asked Plaintiff about his workers' compensation history in the pre-offer stage of the employment process. Such is a violation of the law and subjects Defendant to liability." *Id.* at 20.

Based upon the foregoing, Plaintiff in effect admits he has not suffered any cognizable injury or damage caused by Defendant's ADA violation. Rather, Plaintiff appears to argue that a violation of § 12112(d)(2)(A) necessarily constitutes a compensable injury. In other words, Plaintiff's theory of the case sounds strikingly similar to strict liability. To be sure, Plaintiff alleges in his complaint that he "was denied employment with Defendant by virtue of Defendant's violations of the ADA." Appellant's Appendix at 2. That unsworn allegation, however is insufficient to withstand summary judgment in light of McKnight's unrebutted affidavit that any violation of the ADA had nothing to do with Defendant's decision not to hire Plaintiff.

The court concludes that Plaintiff advanced evidence in his affidavit that Defendant's reason for failing to hire him was pretextual, and thus summary judgment for want of injury is improper. I disagree. While the court does a good job of

instructing Plaintiff how to proceed on remand, the fact that Defendant never informed Plaintiff of the precise job requirements does nothing to negate McKnight's affidavit that upon review of Plaintiff's application, Defendant concluded Plaintiff was unqualified for the job. Rule 56 "mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Plaintiff has failed to establish any compensable injury caused by Defendant's improper questioning.

The court further states that our decision in *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221 (10th Cir.1997), requires us to reverse the district court. Court's Op. at 5. I again disagree. First, in *Roe* the court expressly stated: "We need not and do not decide whether the ADA provides a cause of action to an unsuccessful job applicant who has been subjected to a prohibited inquiry.... We hold only that a present employee may sue for injunctive relief from such a prohibited inquiry, as is the case here." *Id.* at 1229 n. 5. Second, I am willing to assume for purposes of this case that the ADA provides a cause of action to any unsuccessful job applicant subjected to a prohibited inquiry. The court may very well be correct when it states the policy of the ADA is "best served by allowing all job applicants who are subjected to illegal medical questioning *and who are in fact injured thereby* to bring a cause of action against offending employers." Court's Op. at 9 (emphasis added). The record in this case, however, shows beyond a shadow of a doubt that Plaintiff was not injured by Defendant's illegal questioning. Accordingly, I would follow the Fifth Circuit's recent decision in *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554 (5th Cir.1998), which is indistinguishable from our case.

In *Armstrong*, the district court held, as did the district

court in our case, that because plaintiff presented no evidence that he was disabled within the meaning of the ADA, defendant was entitled to summary judgment on the claim that defendant conducted a prohibited medical inquiry under § 12112(d)(2)(A). 950 F. Supp. 162, 167-68 (M.D. La.1996). On appeal, the Fifth Circuit assumed that the ADA provided plaintiff with a cause of action and that he had established a violation of § 12112(d)(2)(A). The court held, however, that "damages liability under § 12112(d)(2)(A) must be based on something more than a mere violation of that provision. There must be some cognizable injury in fact of which the violation is a legal and proximate cause for damages to arise from a single violation." 141 F.3d at 562. Because the non-disabled applicant in Armstrong could not show that the prospective employer's impermissible medical questions caused him any injury, the Fifth Circuit affirmed the district court's grant of summary judgment to the employer. Likewise, because Plaintiff in this case has not shown that Defendant's impermissible medical questions injured him, I would affirm the district court's grant of summary judgment to Defendant. The ADA cannot reasonably be construed to protect a job applicant, who is neither disabled nor perceived to be disabled, from not being hired for a reason wholly unrelated to any disability or perceived disability. Accordingly, I respectfully dissent.

[Filed May 19, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Randy D. Griffin, Plaintiff,
v.
Steeltek, Inc., an Oklahoma corporation, Defendant.

No. 97-C-136-K.

ORDER

Before the Court is Defendant's Motion to Dismiss (docket # 4).

*Statement of Facts*

This case involves a claim of employment discrimination under the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("ADA").

On April 26, 1996, Plaintiff filed out an application for employment as a grinder with Defendant pursuant to a newspaper advertisement for the position. The application form asked various questions regarding the Plaintiff's education and work experience, and also included the following questions: "Have you received Workers' Compensation or Disability Income payments?" "Have you any physical defects which preclude you from performing certain jobs?" "If yes, describe." On the application form, Plaintiff described his Worker's Compensation/Disability Income payment as "3 degree burn to hand and foot, surgery to elbow, spain [sic] in shoulder". Plaintiff did not describe any physical defects which would preclude him from performing certain jobs. Plaintiff claims that he was told at the time that he was the most qualified applicant at that time, which he understood to indicate that he would be hired. Several days later, the Plaintiff called the Defendant to

check the status of his application, and was informed that no decision had been made. Later, the Plaintiff was informed that someone else was hired for the position.

The Defendant has submitted affidavits indicating that the position in question had an unwavering requirement of two years of prior experience as a grinder, and that the Plaintiff was not hired solely because he did not possess the requisite experience level. However, the parties dispute whether this requirement was ever revealed to the Plaintiff, or whether the requirement actually existed.

*Summary Judgment Standard*[1]

Summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." *Fed R. Civ. P.* 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249- 52, 106 S.Ct. 2505, 2510-12, 91 L.Ed.2d 202 (1986). "A fact is 'material' only if it 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.' " *MacDonald v. Delta Air Lines*, 94 F.3d 1437, 1440 (10th Cir.1996) (*citations omitted*). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir.1992).

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[1]As both parties have relied on information and evidence outside of the initial pleadings, this motion was properly converted into a Motion for Summary Judgment pursuant to *Fed R. Civ. Pro.* 12(b).

*Discussion*

Defendant argues that summary judgment should be granted in this case because the Plaintiff has failed to establish a prima facie case of disability discrimination under the ADA. Specifically, Defendant asserts that the Plaintiff was neither disabled as defined under the ADA, nor qualified for an employment position as a grinder. Plaintiff asserts that summary judgment is inappropriate, because the Defendant violated the ADA by asking improper questions regarding Plaintiff's disabilities before an offer of conditional employment was made. Defendant responds by insisting that the Plaintiff has no standing to bring a claim under the ADA as he is not a person with a disability under the Act. The Plaintiff admitted in his response brief that he is not claiming to be either disabled or perceived as disabled, but that his claim is based solely on the fact that the Defendant violated the ADA by asking prohibited questions. Thus, it appears that the issue presented is whether the provisions of the ADA prohibiting pre-employment, non-business related medical inquiries provide a cause of action for an individual who is not disabled as defined under the ADA.

The ADA prohibits discrimination against qualified individuals with a disability because of the disability of such individual in regard to job application procedures, hiring, discharge, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). Additionally, the ADA prohibits employers from conducting a medical examination or making inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability. 42 U.S.C. § 12112(d)(2)(A). The Equal Employment Opportunities Commission ("EEOC") has promulgated interpretive guidelines pertaining to these provisions which make it clear that employers are not to inquire about an applicant's workers' compensation history. *See* Appendix to 29 C.F.R. § 1630.13(a) (1996).

There is no explicit language in Title I of the ADA

providing a cause of action for non-disabled job applicants pursuant to 42 U.S.C. § 12112(d)(2)(A). Although that subsection does define such inquiries as discrimination, it also makes a direct reference to subsection (a), which is the general rule prohibiting discrimination against *a qualified individual with a disability*. Additionally, the EEOC regulations specify only defenses to disparate treatment charges brought under §§ 1630.4 through 1630.8, and 1630.11 through 1630.12. *See*, 29 C.F.R. § 1630.15. There is no mention in the regulations of a defense to a disparate treatment charge arising solely out of a 42 U.S.C. § 12112(d)(2)(A) violation. Similarly, the purpose statement of the ADA clearly indicates that the ADA was intended to prevent discrimination against individuals who are disabled, or who suffer discrimination because they are perceived as disabled. *See*, 42 U.S.C. § 12101(b) (stating four purposes for the ADA; each of which specifically mention individuals *with disabilities*). The Court has found only one case addressing this issue.

In *Armstrong v. Turner Indus., Ltd.*, 950 F.Supp. 162 (M.D.La.1996), the plaintiff alleged that he was denied a job as a pipefitter because he was regarded as having a disability. *Id.* at 163. Additionally, the plaintiff alleged that, whether he was perceived as disabled or not, he was subjected to prohibited medical inquiries before a conditional offer of employment was extended, and thus was entitled to bring a cause of action against the defendant. *Armstrong*, 950 F. Supp. at 163. The defendant in *Armstrong* contended that it was entitled to summary judgment on the ground that the plaintiff was not perceived as disabled. *Id.* The defendant further argued that even if the plaintiff were perceived as disabled, he was fired because he falsified job application forms rather than because of any disability. *Id.* The defendant also maintained that, because the plaintiff was not disabled as defined in the ADA, he could not assert a violation of 42 U.S.C. 12112(d)(2)(A). *Id.*

After determining that the plaintiff was not disabled as

defined in the ADA, the *Armstrong* court held that the plaintiff could not maintain a separate cause of action based upon the defendant's alleged misconduct in making inquiries regarding the plaintiff's medical condition. *Armstrong*, 950 F.Supp. at 167-68 (noting that nothing in the statute or legislative history supported the conclusion that Congress intended job applicants without disabilities to have a cause of action for violations of the ADA rules on preemployment examinations and inquiries). This Court agrees with the Armstrong decision, and holds that a prima facie case of employment discrimination under § 102 of the ADA necessarily requires a finding of disability as defined under the ADA. *See, MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1443 (10th Cir.1996).

*Conclusion*

Because Plaintiff has failed to allege either that he was disabled or perceived as disabled as defined under the ADA, he has not established a prima facie case of disability discrimination. For this reason, the Defendant is entitled to judgment as a matter of law. Defendant's Motion for Summary Judgment (docket # 4) is GRANTED.

ORDERED this 16 day of May, 1997.

/s/ Terry C. Kern
Terry C. Kern, Chief
United States District Judge

[Filed May 21, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Randy D. Griffin, Plaintiff,
v.
Steeltek, Inc., an Oklahoma corporation, Defendant.

No. 97-C-136-K.

JUDGMENT

This mater came before the Court for consideration of the Defendant Steeltek, Inc.'s Motion for Summary Judgment[1] pursuant to *Fed.R.Civ.P.* 56. The issues having been duly considered and a decision having been rendered in accordance with the Order filed on May 19, 1997, the Court finds summary judgment is appropriate in favor of Defendant Steeltek, Inc.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Steeltek, Inc. and against the Plaintiff.

ORDERED this 21 day of May, 1997.

/s/ Terry C. Kern
Terry C. Kern, Chief
United States District Judge

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[1]As both parties have relied on information and evidence outside of the initial pleadings, the Defendant's motion, initially titled as a motion to dismiss, was properly converted into a Motion for Summary Judgment pursuant to *Fed.R.Civ.Pro.*12(b).

§§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such an individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

* * * *

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.